

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Saint Cloud
Wastewater Treatment Plant
NPDES Permit.

**RECOMMENDED ORDER GRANTING
SUMMARY DISPOSITION**

The above-entitled matter is before Administrative Law Judge Richard C. Luis on the City of Saint Cloud's motion for summary disposition. The motion for summary disposition was filed on September 5, 2002. The Minnesota Center for Environmental Advocacy (MCEA) filed a responsive memorandum on September 30, 2002. The Minnesota Pollution Control Agency staff filed a responsive memorandum on October 1, 2002. No oral argument was had on the motion. The City of Saint Cloud and Agency staff filed surreply memoranda on October 18 and 24, 2002, respectively. The record on the motion closed with the surreply filings.

Robert B. Roche, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota, 55101-2127, represented the staff of the Minnesota Pollution Control Agency ("MPCA"). Christopher M. Hood, Flaherty & Hood, P.A., 444 Cedar Street, Suite 1200, St. Paul, Minnesota, 55101, represented the City of St. Cloud. Janette K. Brimmer, Staff Attorney for the MCEA, 26 East Exchange Street, Suite 206, St. Paul, Minnesota, 55101-1667, represented the Minnesota Center for Environmental Advocacy.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the Minnesota Pollution Control Agency shall not be made until this Recommended Order has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Agency. Parties should contact Commissioner Karen A. Studders, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155-4194, to learn about the procedure for filing exceptions or presenting argument.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

1. That the City's Motion for Summary Disposition be GRANTED.
2. That this matter be referred back to the Minnesota Pollution Control Agency for issuance of a NPDES permit to the City for operation of its wastewater treatment facility.

Dated: October 31, 2002.

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

MEMORANDUM

Contested Case Background

The City of Saint Cloud ("City") operates a wastewater treatment plant ("WWTP") to reduce pollutants in the wastewater discharged by the City into the Mississippi River.¹ The operation of a WWTP requires the City to hold a National Pollutant Discharge Elimination System (NPDES) permit, issued by the MPCA. The City applied for reissuance of its NPDES permit.² In the permitting process, notice and an opportunity for comment is afforded to interested persons and entities. Among those commenting on the City's application were the Minnesota Department of Natural Resources ("DNR") and the Minnesota Center for Environmental Advocacy (MCEA).

After receiving comments, the MPCA Board considered a request from the MCEA that a contested case proceeding be held to develop a record to resolve disputed issues of fact relating to three issues. The three issues identified by the MCEA are: 1) whether the proposed discharge of phosphorus from the City's WWTP is in amounts that will affect a lake or reservoir; 2) does the proposed permit require the City to remove phosphorus to the fullest extent practicable; and 3) does the proposed permit allow the City to discharge phosphorus in amounts that are likely to cause pollution, impairment of water quality, or harm aquatic habitat resources. MPCA staff opposed the request, maintaining that the MCEA had not shown that issues of fact exist that

¹ The discharge occurs at mile 930 of the Upper Mississippi ("UM 930"). MPCA Exhibit B, at 2.

² See City Exhibit D.

must be resolved through the contested case process.

The MPCA Board considered the request for a contested case hearing from the MCEA. The MPCA Board concluded that no factual issues were presented by the second and third issues identified in the MCEA's request. Those two requests were denied. The MPCA concluded that a sufficient showing had been made to refer the first issue for contested case hearing. As stated in the Notice and Order for Hearing, the issue to be decided in this matter is "whether the discharge of phosphorus from the St. Cloud wastewater treatment plant affects a lake or reservoir."

After the contested case was initiated, the City, the MCEA and the MPCA staff engaged in discovery. Upon the conclusion of discovery, the City moved for summary disposition. The MPCA staff responded to the motion, agreeing that there are no genuine issues of material fact to be decided in a hearing. The MCEA opposed the motion, asserting that summary disposition is inappropriate in this matter.

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.³ The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.⁴

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.⁵ To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.⁶ A nonmoving party cannot rely on pleadings alone to defeat a summary judgment motion.⁷ The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.⁸ The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.⁹

³ Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1995); Louwgie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.

⁴ See Minn. Rules 1400.6600 (1998).

⁵ Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).

⁶ Thiele v. Stitch, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).

⁷ White v. Minnesota Dept. of Natural Resources, 567 N.W.2d 724 (Minn. App. 1997).

⁸ *Id.*; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988).

⁹ *Carlisle*, 437 N.W.2d at 715, *quoting* Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party,¹⁰ and all doubts and factual inferences must be resolved against the moving party.¹¹ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.¹²

General Statement of the Issue Presented

The parties generally agree that the City's WWTP discharges 1.7 milligrams of phosphorus per liter (mg/L). Where such a facility is discharging directly to a lake or reservoir, the maximum allowable discharge of phosphorus is 1.0 mg/L. The same limitation is applied if the discharge is to a river and the discharge "affects a lake or reservoir."¹³ The parties agree that the City's WWTP is discharging to the Mississippi River. The issue in this matter is whether the City's discharge of phosphorus affects a lake or reservoir within the meaning of Minn. Rule 7050.0211, subp. 1a.

Propriety of Summary Disposition

¹⁰ Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984).

¹¹ See, e.g., Celotex, 477 U.S. at 325; Thompson v. Campbell, 845 F.Supp. 665, 672 (D.Minn. 1994); Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971).

¹² Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986).

¹³ Minn. Rule 7050.0211, subp. 1a. The full language of the rule reads:

Subp. 1a. **Total phosphorus effluent limits.** Where the discharge of effluent is directly to or affects a lake or reservoir, phosphorus removal to one milligram per liter shall be required. The limit must be a calendar month arithmetic mean unless the commissioner finds, after considering the criteria listed in items A and B, that a different averaging period is acceptable. In no case shall the one milligram per liter limit exceed a moving mean of 12 monthly values reported on a monthly basis, or a simple mean for a specified period, not to exceed 12 months. Calendar month effluent limits in effect on February 7, 2000, must remain in effect unless an assessment of the criteria listed in items A and B indicate a different averaging period is acceptable. A different averaging period is acceptable when:

A. the effects of the phosphorus loading from the facility on the receiving water or downstream water resources is generally not measurable; and

B. the treatment technologies being considered offer environmental, financial, or other benefits.

In addition, removal of nutrients from all wastes shall be provided to the fullest practicable extent wherever sources of nutrients are considered to be actually or potentially detrimental to preservation or enhancement of the designated water uses. Dischargers required to control nutrients by this subpart are subject to the variance provisions of part 7050.0190.

MCEA asserts that the referral of this matter by the MPCA Board for a hearing constitutes a determination that genuine issues of material fact exist. If so, summary disposition would be inappropriate. The City maintains that this matter is no different from any other contested case proceeding and that a genuine issue of material fact must be affirmatively presented to defeat its motion. The MPCA staff agreed with the City that summary disposition is appropriate in this matter. The MPCA staff indicated that the MCEA had asserted that evidence would be produced regarding the effects of the phosphorus discharge on a lake or reservoir.¹⁴

Regardless of how a matter is initially referred for contested case proceedings, all of the standards in such matters apply to each contested case. Parties have the right to test their framing of issues prior to the hearing. The goal of judicial economy is advanced when matters not truly at issue are resolved prior to the hearing. The initial finding of issues to be resolved by the MPCA Board relied upon the assertions of the parties, without the benefit of discovery. Now that discovery has been conducted, a motion is appropriate to determine if a genuine issue of material fact exists that the City's discharge of phosphorus "affects a lake or reservoir."

Coon Rapids Pool

The MCEA asserts that the discharge from the City's WWTP affects the Coon Rapids Pool, thereby triggering the application of Minn. Rule 7050.0211, subp. 1a. The MPCA staff and the City assert that the Coon Rapids Pool is not a "lake or reservoir" within the meaning of the applicable rule and that the City's discharge of phosphorus does not affect that water body.

In support of its assertion that the Coon Rapids Pool is a reservoir, the MCEA cites the DNR's Bulletin 25, that lists the Coon Rapids Pool among the reservoirs in Hennepin County. The City and the MPCA staff indicate that the MPCA has not interpreted bodies of water behind dams with residence times of less than 14 days as lakes or reservoirs, but rather part of the river.¹⁵ The MCEA points out that there is no rule defining water bodies as excluded from categorization as reservoirs based on residence time.

The City vigorously disputes categorizing the Coon Rapids Pool as a reservoir. The residence time of water in the Coon Rapids Pool is 1.9 days or less under low-flow conditions.¹⁶ The residence time is often significantly less, approaching 0.5 days during the summer.¹⁷

Taking the facts in the light most favorable to the nonmoving party, the MCEA, the Coon Rapids Pool is a reservoir within the meaning of Minn. Rule 7050.0211, subp. 1a.¹⁸ As the MCEA recognizes, the ultimate issue in this matter is whether the

¹⁴ MPCA Reply, at 1.

¹⁵ City Exhibit N, Admission 24. "Residence time" is the length of time water spends within the boundaries of the water body. The longer the residence time, the more amenable the water body is to undesirable impacts caused by pollutants.

¹⁶ City Exhibit Q.

¹⁷ *Id.*

¹⁸ The finding that the Coon Rapids Pool is a reservoir is only for the purposes of the City's motion for summary disposition. If this matter were to go to hearing, evidence would be considered regarding the

discharge of phosphorus from the City's WWTP "affects" water bodies, such as the Coon Rapids Pool. The City asserts that summary disposition is appropriate regarding the Coon Rapids Pool since the MCEA has not shown that the water body has been affected by the City's phosphorus discharge.

The MCEA asserts that the DNR supports the conclusion that a 1 mg/L limit should be applied to the City's phosphorus discharge. The DNR participated in the NPDES permit process and supported the MPCA staff's recommendation that a phosphorus management plan (PMP) be required, rather than the 1 mg/L limit.¹⁹ In arriving at that conclusion, the DNR analyzed the relationship between phosphorus loading and the concentrations of chlorophyll *a* present in the Coon Rapids Pool.²⁰ The summer and annual averages for total chlorophyll *a* were attached to the DNR's written conclusion.²¹ The DNR's conclusion was that a PMP was the appropriate condition to place on the City's NPDES permit. Regarding the impact of phosphorus discharged by the City, the DNR stated:

In offering our comments on this permit, DNR continues to recognize the reservoir status of the Coon Rapids impoundment as well as the Mississippi River Navigation Pools A, B, 1 and 2, all of which are listed in MDNR Bulletin 25. This is the same perspective we offered to MPCA during your deliberations on the now adopted Phosphorus Strategy. As such, the role played by the phosphorus discharge from this facility in the possible impairment of downstream waters, especially under conditions of very low flows, should reflect careful consideration in each 5-year permit cycle. **At normal flows this facility's discharge constitutes a substantial fraction of the cumulative basin loading for phosphorus that has resulted in water quality impairments of downstream resources.** As this municipality continues to grow, and the current discharge flow (9.0 MGD [million gallons per day]) expands to full design capacity (14.7 MGD), the potential for water quality impact rises dependent on stream flow and phosphorus treatment efficiency. **As actual discharge volumes increase as a function of anticipated growth, the possibility increases that the discharge from the St. Cloud WWTF may have a measurable effect upon the river and downstream reservoirs,** especially given the fact that the majority of the effluent's phosphorus is discharged as biologically available ortho-phosphorus. This situation results in a disproportionately high fraction that can contribute to the formation of algal biomass.²²

characteristics of the Coon Rapids Pool for determining the issue as a matter of fact. The existence of this issue does not preclude a grant of summary disposition, since the status of the Coon Rapids Pool is not the ultimate issue in this matter.

¹⁹ Mark Ten Eyck Affidavit, Exhibit D, at 1.

²⁰ Mark Ten Eyck Affidavit, Exhibit D, at 2-3. The measurements are taken at UM 871.6, located in Anoka, Minnesota, approximately five miles above the Coon Rapids Dam.

²¹ Mark Ten Eyck Affidavit, Exhibit D, Attachment.

²² Mark Ten Eyck Affidavit, Exhibit D, at 3 (emphasis added).

The analysis by the DNR indicates that there is no current measurable effect from the City's phosphorus discharge on any downstream lake or reservoir. This conclusion is consistent with the assessment of the MPCA staff. The MPCA staff and the City assert that the MPCA's longstanding interpretation of the applicable rule is that a discharge must have a measurable effect on an affected lake or reservoir before the 1.0 mg/L phosphorus limit is imposed through a discharge permit.²³ The MCEA asserts that cumulative impacts are sufficient to demonstrate a genuine issue of material fact for whether the limitation must be imposed.

The manner in which agency interpretations are assessed was set out in a recent contested case proceeding.²⁴ In that matter, the ALJ set out the analysis as follows:

The only issue presented in this proceeding is the proper interpretation [of] Minnesota Rule 7020.0400, subpart 5, and the application of the rule to the stipulated facts. Deference is given to an agency's interpretation of its own regulation, especially when the relevant language is unclear or susceptible to different interpretations. If the regulation is ambiguous, the agency's interpretation will generally be upheld if it is reasonable. No deference is given to an agency's interpretation, however, where the language of the regulation is clear and capable of being understood. Moreover, if an interpretation has not been consistently applied in the past, a court may cite this as an important factor in finding the interpretation to be an invalid (unpromulgated) interpretive rule. Interpretations by agencies that attempt to clarify the law they administer and are not within the plain meaning of an existing rule are deemed to be interpretive rules. Interpretive rules must be adopted pursuant to the rulemaking requirements of the Minnesota Administrative Procedure Act in order to be valid.²⁵

The relevant language for interpretation is the meaning of the word "affects" in Minn. Rule 7050.0211, subp. 1a. The word is not further defined in the rule. The term "affects" is open to interpretation, on its face. The MPCA has consistently interpreted the word to require there be some measurable impact attributable to the discharge. The existing NPDES permit was issued to the City using that interpretation. The DNR recognized the MPCA's interpretation while participating in the City's permit application process. The MPCA's interpretation of Minn. Rule 7050.0211, subp. 1a, is entitled to deference in this matter.

To defeat the City's Motion, the MCEA must show that there is a genuine issue of material fact regarding measurable impact arising from the discharge of phosphorus from the City's WWTP. MCEA has consistently relied upon the *cumulative* phosphorus load in the Mississippi River at UM 871.6 to support the conclusion that the City's WWTP discharge of phosphorus affects a lake or reservoir. The evidence relied upon by the MCEA is entirely that produced by the MPCA and considered before the referral

²³ The MPCA points out that limits may be imposed through other means, such as the total mean daily load (TDML) process used where waters are determined to be impaired. MPCA Reply, at 10.

²⁴ **ITMO Jennie-O Foods Administrative Penalty Order**, OAH Docket No. 11-2200-12862-2 (ALJ Recommended Order issued June 21, 1999).

²⁵ **ITMO Jennie-O Foods Administrative Penalty Order**, *supra*, at 5.

of this matter for contested case hearing. MCEA acknowledged that it conducted no independent studies of water quality that demonstrate the *individual* impact of the City's phosphorus discharge on downstream water resources.²⁶ The MCEA anticipates relying upon the data from the MPCA and Metropolitan Council Environmental Services (MCES) regarding the levels of chlorophyll *a* in the Coon Rapids Pool.²⁷ All of the evidence identified by the MCEA is of cumulative effects of phosphorus.²⁸ None of the evidence indicates a measurable effect on the level of chlorophyll *a* that is attributable to the individual discharge of phosphorus by the City. As discussed above, the MPCA's longstanding interpretation of Minn. Rule 7050.0211, subp. 1a, requires a showing of measurable effect from the discharge on the lake or reservoir to trigger the 1.0 mg/L limit. Since there is no evidence presented that can make that showing, there is no genuine issue of material fact to be decided at a hearing regarding the Coon Rapids Pool.

Vadnais Chain of Lakes

To meet its water needs, the City of Saint Paul (Saint Paul) pumps water from the Mississippi River into the Vadnais Chain of Lakes.²⁹ Saint Paul's pumping station is located at UM 859.³⁰ Saint Paul removes over 15 billion gallons of water per year from the river, transports that water via an aqueduct, and deposits the water into Charley Lake. The water then proceeds into Pleasant Lake, ultimately entering Lake Vadnais. The water removed from Mississippi River contains phosphorus. The MCEA asserts that the Vadnais Chain of Lakes is affected by the phosphorus discharged by the City when the water containing that phosphorus is transferred by Saint Paul to Charley Lake.

The City asserts that, as a matter of law, it does not discharge into the Vadnais Chain of Lakes and therefore Minn. Rule 7050.0211, subp. 1a, does not apply. Additionally, the City relies upon MPCA studies (known as the BATHTUB analysis) to show that there is no correlation between the phosphorus discharged by the City and any measurable impact in the Vadnais Chain of Lakes.³¹ The MCEA has introduced evidence to dispute the conclusions derived from the MPCA analysis. Resolution of the testing issue would require a hearing as genuine issues of fact are presented regarding the existence of a correlation between phosphorus discharged by the City and the measurable impacts experienced by the Vadnais Chain of Lakes. The City can only prevail on summary disposition regarding the Vadnais Chain of Lakes issue if the City is not legally responsible for the discharge to those waters.

The MCEA recognizes that Saint Paul already treats water taken from the Mississippi River to remove phosphorus, before that water is discharged into the Vadnais Chain of Lakes.³² Whether Saint Paul's transfer of water from the Mississippi River precludes imposition of the discharge standard is disputed by the MCEA.

²⁶ City Exhibits H (Answers 1 and 11-15).

²⁷ City Exhibits I (Response 8) and Exhibit J (Response 2).

²⁸ See, e.g. Brimmer Affidavit, Exhibit C.

²⁹ MPCA Exhibit B, at 2.

³⁰ MPCA Exhibit B, at 2.

³¹ City Memorandum, at 10-11.

³² City Exhibit A, at 3.

The City has cited a number of federal cases on the issue of responsibility for discharges from point sources where water is transferred from one water body and no additional pollutants added. As the issue was presented in one such case:

The Clean Water Act prohibits the discharge of pollutants from a point source into navigable waters without an NPDES permit. See 33 U.S.C. §§ 1311, 1342. The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." See 33 U.S.C. § 1362(12). No party disputes that the S-9 pump station and, in particular, the pipes from which water is released constitute a point source or that the water released by the station contains pollutants. Also, both parties agree that the C-11 Canal and the WCA-3A constitute navigable waters. The parties mainly dispute one legal issue: whether the pumping of the already polluted water constitutes an addition of pollutants to navigable waters from a point source.³³

The issue in *Miccossukee* is identical to the issue presented here. The 11th Circuit concluded that the relevant inquiry is from the point of view of the receiving waters. The Court of Appeals concluded where the polluted water is coming from a point source that is the "cause-in-fact" of the pollution entering the receiving waters, the operator of that point source is the discharger who must obtain an NPDES permit.³⁴ This holding is consistent with a number of earlier cases from other circuits, all applying the standards of the Clean Water Act in assessing the need for an NPDES permit.³⁵

The MCEA does not cite any case law holding that the NPDES permit requires analysis of waters not naturally receiving the discharge. Rather, MCEA argues that:

There is absolutely nothing in any of the cases cited that discusses or even alludes to excusing upstream dischargers of pollutants (especially large ones like St. Cloud) from water quality standards and rules simply because there are also downstream dischargers (or "transferors") of the same pollutant. Clearly, the P rule does not say that the last discharger of phosphorus is the one that must be held responsible for all discharges of phosphorus upstream of that point.³⁶

³³ *Miccossukee Tribe v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).

³⁴ *Id.*

³⁵ *Catskill Mountains Chapter of Trout Unlimited v. New York City*, 273 F.3d 481 (2nd Cir. 2001) ("the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit."); *DuBois v. U.S. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) ("we hold *infra* that, even if the pipes add no new pollutants, the transfer of East Branch water through Loon Corp.'s privately owned pipes and its discharge into Loon Pond constitutes a point source discharge of at least some pollutants into the Pond, thereby requiring an NPDES permit."); *Committee to Save Mokelumne River v. East Bay Municipal Utilities District*, 13 F.3d 305 (9th Cir. 1993) ("The Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of a pollutant from a point source without a permit. 33 U.S.C. §§ 1311(a), 1342(a); *Consumers Power Co.*, 862 F.2d at 582.").

³⁶ MCEA Memorandum, at 13. It is noted that holding the City responsible for the cumulative impact of all phosphorus dischargers upstream of the first affected lake or reservoir seems to be what the MCEA seeks in this proceeding.

The analysis offered by the MCEA is misplaced. Every discharger is responsible for the pollutants put into the receiving water and that responsibility continues downstream into any other water that is part of the natural flow. The impact of phosphorus on downstream resources is the reason that a PMP is included in the NPDES permit that the MPCA staff has proposed for the City. For the 1 mg/L standard to apply, a measurable effect from the City's discharge must be demonstrated in waters receiving that discharge. When Saint Paul intervenes to pump Mississippi River water into the Vadnais Chain of Lakes, Saint Paul becomes the discharger of that water and Saint Paul is responsible for any pollutants contained in that water. There is no issue of fact to be determined regarding the City's responsibility for the discharge of Mississippi River water into the Vadnais Chain of Lakes since the City is not responsible for that discharge as a matter of law.

Lake Pepin

Lake Pepin is located over 100 miles downstream of the City's discharge into the Mississippi River. In contrast to the Coon Rapids Pool, Lake Pepin is recognized by the MPCA as a water body to which the phosphorus limit is applicable. As the MPCA Phosphorus Strategy states:

One key factor that separates lakes and reservoirs from rivers is residence time. Natural lakes generally have very long residence times, typically measured in terms of months to decades, and hence residence time is more than adequate to allow for growth of algae. Reservoirs, on the other hand, may vary substantially with residence times measured in terms of weeks, months, or years. Lake Pepin (a run-of-the-river reservoir), for example, exhibits residence times of about 19 days on average but may range from a low of 5 - 6 days at high flow to over 60 days at very low flows.³⁷

The MPCA Phosphorus Strategy explicitly addressed the situation presented by flow conditions in Lake Pepin. The water circulation analyses of Lake Pepin, Spring Lake, and other pools on the Mississippi River led the MPCA to conclude:

Thus wastewater treatment facility (WWTF) discharges directly to these pools, with the exception of Lake Pepin and Spring Lake, should not be treated as a discharge to a "lake or reservoir" and automatically be required to treat to a *monthly* 1 mg/L. For WWTF discharges in the Lower Mississippi River Basin (and potentially other basins as well), above Lake Pepin, the phosphorus effluent rule will be applied in terms of "affects" on Lake Pepin.³⁸

The description of the analysis for application of the phosphorus rule to Lake Pepin is consistent with the MPCA's longstanding interpretation of that rule. To prevail in this motion for summary disposition, the MCEA must demonstrate that a genuine issue of material fact exists regarding the measurable impact of the phosphorus discharge by the City on Lake Pepin.

³⁷ City Exhibit B, at 11 (emphasis in original).

³⁸ City Exhibit B, at 13 (emphasis in original).

The showing that the MCEA expects to make is one of cumulative impacts. As the MCEA argues:

As stated above, phosphorus introduced into the water body will grow algae in Minnesota. It is conservative—it stays in the system for a long time. The Coon Rapids reservoir is eutrophic. Lake Pepin is in trouble due to high levels of phosphorus. The Vadnais Chain of Lakes is undergoing constant treatment and manipulation by the City of St. Paul to remove and treat phosphorus and its ill effects in the water. A logical, reasonable, supportable conclusion from the accumulation of this evidence and the opinions of experts like Dick Osgood, is that phosphorus from the St. Cloud discharge must be having an effect—it is improbable that it does not.³⁹

As discussed above, the standard for imposition of the 1 mg/L limit on phosphorus discharges is whether a measurable impact of the particular discharge is observed in a lake or reservoir affected by that discharge. The requirement for a measurable impact of the particular discharge is a matter of MPCA policy. There is nothing preventing the MPCA from changing that policy, as an exercise of its authority. That authority does not extend to ALJs in contested case proceedings. Absent the MPCA's stating expressly that its application of the rule has changed, or engaging in rulemaking to effectuate such a change, the longstanding interpretation of the MPCA must be given deference in this proceeding.

The MCEA offers only evidence of impacts caused by cumulative discharges to support its position. In the deposition of a MPCA staff member, MCEA inquired into the discussions held on applying the 1 mg/L phosphorus limitation to dischargers based on cumulative discharges.⁴⁰ Those discussions did not result in a change in the MPCA's policy, which is to impose the 1 mg/L discharge limit on a point source (such as the St. Cloud WWTF) only if its discharge is found to have a measurable, specific impact on the receiving water. The specific figures discussed for all of the phosphorus impacts are all cumulative numbers.⁴¹ In this instance, cumulative numbers fall short of the factual threshold needed to defeat a motion for summary disposition.

The MCEA has had the opportunity to produce such evidence showing a measurable impact from the discharge of phosphorus from the City's WWTF, or obtain such evidence through discovery from any other source. Presenting facts showing an individually measurable impact from the St. Cloud facility's discharge is required to show a genuine issue of material fact, and no such facts have been presented. Asserting conclusions or opinions does not meet the nonmoving party's burden to resist a motion for summary disposition. The absence of conflicting evidence compels the conclusion that there are no material facts in dispute. The City has demonstrated that the application of Minn. Rule 7050.0211, subp. 1a, to the undisputed facts in this matter does not require the imposition of a 1 mg/L limitation for the discharge of phosphorus from the City's WWTF. The MPCA staff has indicated that, consistent with its

³⁹ MCEA Memorandum, at 14.

⁴⁰ Brimmer Affidavit, Exhibit C, at 47-48.

⁴¹ See e.g., Brimmer Affidavit, Exhibit C, Heiskary Exhibit 9, at 43; Osgood Affidavit, Exhibit B, at 5-6.

Phosphorus Strategy, a PMP is the appropriate requirement to add to the City's NPDES permit. For these reasons, the Administrative Law Judge recommends that the MPCA Board GRANT the City's Motion for Summary Disposition and issue the requested NPDES permit as recommended by the MPCA staff.

R.C.L.